

*United States Court of Appeals
for the Second Circuit*



**PETITIONER'S
REPLY BRIEF**

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P/S

No. 75-4046

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

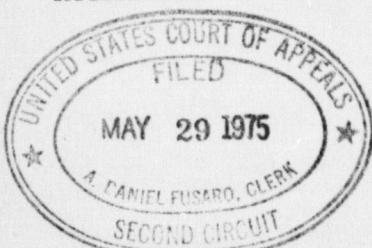
FEDERAL COMMUNICATIONS COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents,

AERONAUTICAL RADIO, INC.; AEROSPACE INDUSTRIES
ASSOCIATION OF AMERICA, INC.; AIR TRANSPORT
ASSOCIATION OF AMERICA; AMERICAN NEWSPAPER
PUBLISHERS ASSOCIATION; THE ASSOCIATED PRESS;
COMMODITY NEWS SERVICES, INC.; COMMONWEALTH
OF PENNSYLVANIA; GENERAL TELEPHONE COMPANY
OF CALIFORNIA, et al.; MCI TELECOMMUNICATIONS
CORPORATION, et al.; MUTUAL BROADCASTING SYSTEM,
INC.; UNITED PRESS INTERNATIONAL, INC.; and UNITED
STATES INDEPENDENT TELEPHONE ASSOCIATION,

Intervenors.

On Petition To Review
An Order Of The Federal Communications Commission

REPLY BRIEF FOR PETITIONER
AMERICAN TELEPHONE AND TELEGRAPH COMPANY



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May 29, 1975

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**On Petition To Review
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**REPLY BRIEF FOR PETITIONER
AMERICAN TELEPHONE AND TELEGRAPH COMPANY**

This reply brief is filed on behalf of petitioner American Telephone and Telegraph Company ("AT&T") in response to the brief of the respondents, the Federal Communications Commission and the United States, and the briefs of the intervenors who support the respondents in whole or in part.¹

¹ The intervenors who filed separate briefs supporting the Commission are Aerospace Industries Association of America, Inc. ("AIA"); Commonwealth of Pennsylvania ("Pennsylvania"); and MCI Telecommunications Corporation ("MCI"). Aeronautical Radio, Inc. and Air Transport Association of America (ARINC/ATA) filed a statement of position in lieu of a brief.

I. THE COMMISSION'S ATTEMPT TO JUSTIFY ITS REJECTION ORDER BY ASSERTING A BROAD, GENERALIZED PRESCRIPTIVE POWER IS CONTRARY TO THE COMMUNICATIONS ACT AND THE APPLICABLE JUDICIAL DECISIONS.

The importance of the issues raised on review of the Commission's unprecedented rejection Order far transcends the procedural circumstances of the present case, for the Commission's action would effectively destroy the congressionally-established balance of interests provided in the Communications Act. The explicit provisions of the Act create a regulatory scheme under which carriers initiate rate changes; the Commission is authorized to delay the rates' effectiveness for a limited statutory period; and thereafter the rates take effect by operation of law, subject to the Commission's power to investigate and require refunds or reparations. These "precise procedures and limitations" with respect to the Commission's authority reflect Congress' careful accommodation of the interests of the carriers and their customers.²

In their brief respondents have sought to justify an order of the Commission that drastically alters this balance of interests. Under respondents' theory, once a rate of return finding has been made (and labeled a "prescription"), the Commission can reject changes in carrier-made rates—without any hearings or findings as to their lawfulness—and thereby delay the effectiveness of carrier-initiated rate changes for an unlimited period.

While acknowledging that Section 205 of the Communications Act can be the only statutory support for its position, respondents do not seriously attempt to demonstrate that the Commission's claimed authority comes within the

² *American Telephone and Telegraph Co. v. FCC ("AT&T Special Permission Case")*, 487 F.2d 865, 873 (2d Cir. 1973); *United States v. SCRAP*, 412 U.S. 669 (1973); *Arrow Transportation Co. v. Southern Ry.*, 372 U.S. 658 (1963). See AT&T Br. 15-28.

actual language of Section 205. Indeed, respondents essentially concede the contrary.³ Yet, while explicitly disclaiming any prescription of specific rates or charges, the Commission claims that its rejection Order can be justified on the basis of a "broad discretion" to exercise a generalized "prescriptive power" under Section 205 of the Communications Act (Resp. Br. 22).⁴

Respondents have thus narrowed the issues in this case. The question is whether the Commission's authority to deal with changes in carrier-made rates is circumscribed by the express provisions of Sections 203-205 of the Act, or whether the Commission is empowered to ignore the specific statutory framework on the basis of its invocations of a broad, generalized prescriptive power. As we show herein, the Commission's assertions are contrary to the Communications Act and the applicable judicial decisions.

³ Respondents, for example, do not contest AT&T's showing that the prescription of "charges" as used in Section 205 is synonymous with the prescription of rates (AT&T Br. 32-34). Respondents expressly acknowledge that the Commission had not made a "prior prescription of specific rates" for AT&T (Resp. Br. 19) and that AT&T's rates filed following the Commission's prior rate of return finding were "'carrier made'" rates (Resp. Br. 31). Indeed, in its rejection Order, the Commission conceded that its Docket 19129 Decision did not prescribe "rates" or a "specific rate structure" and that the tariff changes filed by AT&T thereafter were "carrier-made" rates. Order, para. 17 and n. 14 (A. 10).

⁴ At no place in its rejection Order (A. 1-15) here under review did the Commission even cite Section 205 of the Act as the statutory authority for rejecting AT&T's tariff filing. It was for this reason—and not for the reason suggested by respondents (Br. 19, n. 1)—that our opening brief commenced discussion of that section with the statement that the "only statutory basis upon which the Commission may even arguably prevent a carrier from initiating rate changes is set forth in Section 205" (AT&T Br. 28).

A. The Express Statutory Provisions of the Communications Act Establish Precise Limitations on the Exercise of the Commission's Prescriptive Powers That Can Bar Subsequent Carrier-Initiated Rate Changes.

Respondents' brief is notable for its studied avoidance of the statutory language of Section 205. That section is not couched in terms of some generalized "prescription" power but sets forth a specific authority to "prescribe" a carrier's "charges to be thereafter observed." 47 U.S.C. § 205(a). As we showed in our opening brief (pp. 31-36), the statutory term "charges" is the same as rates, and respondents do not contest this. Although respondents disclaim any prior prescription of AT&T's rates, they keep referring to a broad discretionary prescription power, claiming that the Commission's action was somehow "consistent" with Section 205 (Resp. Br. 27).

As this Court has repeatedly recognized, however, the Commission's prescription authority is expressly limited by the statutory language.⁵ Section 205 provides that the Commission may prescribe charges—not a rate of return. Moreover, the statute requires that, in exercising its prescription power, the Commission must (1) make a finding that a carrier's existing "charge" is in "violation of any of the provisions of the Act", (2) determine and prescribe "what will be the just and reasonable charge or . . . charges to be thereafter observed", and (3) "make an order that the carrier . . . shall not thereafter publish, demand or col-

⁵ *American Telephone and Telegraph Co. v. FCC*, 449 F.2d 439, 450 (2d Cir. 1971); *National Ass'n of Motor Bus Owners v. FCC*, 460 F.2d 561, 563-64 (2d Cir. 1972); *AT&T Special Permission Case*, 487 F.2d at 874-75. In the *AT&T Special Permission Case*, this Court reviewed its prior holdings restricting the Commission's authority under Section 205(a) "'to determine and prescribe' lawful *rates*" and emphasized that even "'[t]hat authority is not unlimited'" *Id.* at 874 (emphasis supplied). Before the Commission may act pursuant to its prescription power, specific findings as to "the *rate* to be prescribed" are "essential to any exercise by the Commission of its authority under Section 205(a)." *Id.* (emphasis supplied).

lect any *charge* other than the *charge* so prescribed . . . ” (emphasis supplied).

Failure to make the requisite statutory findings or to issue the requisite order precludes the exercise of the Commission’s prescription power under Section 205. *American Telephone and Telegraph Co. v. FCC, supra*, 449 F.2d at 450-52; *National Ass’n of Motor Bus Owners v. FCC, supra*, 460 F.2d at 563; and see cases cited at AT&T Br. 35-36.

There are sound reasons why the courts have required strict adherence to the statutory standards before agency action may be deemed a valid exercise of the statute’s prescriptive power. As held in the landmark case of *Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Ry.*, 284 U.S. 370 (1932), an agency may exercise its power of prescription “only within the scope of [its] delegation” from Congress (*id.* at 387). When “the Commission declares a specific rate to be the reasonable and lawful rate for the future . . . its pronouncement has the force of a statute” (*id.* at 386.) While the carrier is “bound to conform” to agency-made rates, it is protected from the agency later declaring them to be unlawful and is not subject to refund or reparations at some future date. *Id.* at 387, 390. There is no comparable protection for a so-called “prescription” of rate of return.⁶

⁶ Despite the Commission’s repeated, but unsupported, protestations to the contrary (e.g., Resp. Br. 30-31), the imposition of an order making carrier-made rates subject to refund in the future is plainly inconsistent with an agency act of prescription. The principle established in *Arizona Grocery* makes this clear. The statutory scheme does not allow the Commission to prevent a carrier from changing carrier-made rates and at the same time not afford to the carrier the protection of prescribed agency-made rates.

In *Public Utilities Commission v. United States and FCC*, 356 F.2d 236, 240 (9th Cir.), cert. denied, 385 U.S. 816 (1966), the court held that the statutory term “prescription” has an “established meaning” under the *Arizona Grocery* doctrine, and that the term refers “to a commission-made rate which was not subject to reparations in a subsequent proceeding”

It is not sufficient for respondents to contend that the Commission has some generalized "prescriptive power" under Section 205. This is the very argument rejected by this Court in the *AT&T Special Permission Case*, where the Commission had claimed that its freeze on rate changes was "justified by its broad inherent power to regulate communications carriers." 487 F.2d at 872. This Court held that the Communications Act established a "specific statutory basis for the Commission's authority," and that the Commission is not free to ignore these specific provisions. 487 F.2d at 872-73, 876.⁷

Respondents contend here (as they did in the *AT&T Special Permission Case*) that Section 4(i) of the Act supports the Commission's action by "authorizing it to perform 'any and all acts . . . not inconsistent with this Act, as may be necessary in the execution of its functions.' 47 U.S.C. § 154(i)" (Resp. Br. 27).⁸ They argue that a prescription of rate of return, although not specifically men-

⁷ The agency's statutory obligation cannot be evaded by assertions that it has a wide area of discretion that goes beyond the express language of the regulatory statute. In *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-68 (1962), the Court recognized that "the requirements for administrative action [must be] strict and demanding," for otherwise the exercise of administrative expertise "can become a monster which rules with no practical limits on its discretion." The Court, quoting from *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953), reiterated the principle that "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body," and that administrative action must come within the bounds expressed in the statutory language. *Id.*

⁸ Without even discussing the point, respondents now cite Section 408 of the Communications Act, 47 U.S.C. § 408, as statutory authority for the Commission's summary rejection of AT&T's tariff filing (Resp. Br. 4, 16, 18). Section 408 merely provides that "all orders of the Commission . . . shall continue in force until its further order . . ." But it is evident that Section 408 grants the Commission no authority in addition to that specifically delegated in the rate regulation provisions of Sections 203-05. See *AT&T Special Permission Case*, 487 F.2d at 872-73.

(footnote continued on following page)

tioned in Section 205, is "consistent with the provisions and purposes of Section 205" (Resp. Br. 27). As this Court held, however, Section 4(i) provides no basis for avoiding the specific language of the statute. 487 F.2d at 877 and n. 26.⁹ Thus, it is "charges"—not rates of return—that the Commission may prescribe pursuant to Section 205, and the Act nowhere adds to that authority.

B. The Judicial Decisions Relied Upon by the Commission Do Not Support Its Asserted Generalized Prescription Power.

Respondents place principal reliance upon the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), to support an asserted generalized prescription power (Resp. Br. 20-21, 23-25). But *Permian* involved a moratorium imposed after the FPC had prescribed agency-made rates under the express provisions of the Natural Gas Act. It does not stand for a broad power to bar changes in carrier-made rates.

(footnote continued from preceding page)

Respondents' interpretation of Section 408 is contrary to the maxim that generalized statutory provisions must give way to specific statutory provisions. *Id.* at 877, n. 26; see also *Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932).

⁹ Citing *Willmut Gas & Oil Co. v. FPC*, 294 F.2d 245 (D.C. Cir. 1961), cert. denied, 386 U.S. 975 (1962), this Court noted that Section 16 of the Natural Gas Act (the counterpart of Section 4(i) of the Communications Act) "did not authorize the FPC to circumvent the rate making scheme" expressly set forth in the regulatory statute. 487 F.2d at 878.

In *FPC v. Texaco Inc.*, 417 U.S. 380 (1974), the Court rejected a similar argument of the FPC that Section 16 of the Natural Gas Act gives that agency discretion to act outside the express terms of Sections 4 and 5 of that Act (the counterparts of Sections 204 and 205 of the Communications Act). The Court stated:

"Section 16 . . . does not authorize the Commission to set at naught an explicit provision of the Act. No producer is exempt from §§ 4 and 5. Neither the *Permian Basin Area Rate Cases* nor *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), on which the Government relies, suggests or holds that § 16 permits the Commission to ignore the specific mandates of those sections." (417 U.S. at 394-95).

The Commission relied on *Permian* to support its claimed "broad authority" in the *AT&T Special Permission Case*. But this Court held that *Permian* is wholly inapposite to the question whether the Commission has statutory authority to bar changes in carrier-made rates. 487 F.2d at 876-77, 879-80. As this Court recognized:

"In *Permian*, however, the moratorium was invoked after the FPC had prescribed *agency made rates* pursuant to Section 5(a) of the Gas Act . . . This is a far cry from the Commission's claimed authority to impose the special permission requirement in the instant case while disclaiming any intention to prescribe rates." 487 F.2d at 880 (emphasis supplied).

The Commission's summary rejection of AT&T's January 3, 1975 tariff filing must fail here for the same reason: while admittedly not prescribing rates, the Commission is attempting to impose a special permission requirement on carrier-initiated rate increases.

All that the lengthy excerpt from *Permian*, quoted in respondents' brief (p. 24), shows is that the regulatory agency may use different regulatory formulae to prescribe *rates* under the express statutory provisions of the Natural Gas Act. It does not suggest that there is some broad, generalized prescriptive power that goes beyond the precise terms of the statute. The Supreme Court was concerned only with the effectiveness of *agency made rates* under Section 5(a) of the Natural Gas Act, which the FPC had prescribed and determined to be the "just and reasonable" rates "to be thereafter observed."

Nowhere in *Permian* does the Supreme Court state that a rate moratorium may be imposed, and the statutory suspension period thereby extended for an unlimited period, in situations where the Commission has not previously made a valid statutory prescription of rates.¹⁰ Indeed,

¹⁰ The Court in *Permian*, noting that the FPC's action was premised on the "stability" of the producers' costs, expressly refused to rule on the "propriety of moratoria created in circumstances of changing costs," and suggested that such authority might

(footnote continued on following page)

Permian demonstrates that Congress, when it conferred power on the agencies to prescribe rates, provided a specific statutory framework for its exercise. It shows also that the courts, confronted by agency action preventing rate changes by regulated carriers, do not decide cases on the basis of generalities about expansive agency power but rather by analysis which applies particular statutory provisions to the case at hand. See *Permian, supra*, 390 U.S. at 778-79; *FPC v. Texaco Inc., supra*, 417 U.S. at 393-95.¹¹

Respondents and AIA further rely on *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962), and *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942). The FPC orders in those cases, however, did not involve any rejection of carrier-initiated rate changes, nor did they even suggest that a rate of return finding would be binding in the future so as to permit the agency to reject subsequent carrier-initiated rate changes without a hearing. Instead, these cases dealt with the FPC's power to determine whether the company's existing rates were unjust and unreasonable after the FPC had held a hearing on the rate of return phase. But holding existing rates to be unjust and unreasonable is not sufficient to constitute a valid agency prescription of future rates. See *AT&T v. FCC, supra*, 449 F.2d at 450-53; *National Ass'n of Motor Bus Owners v. FCC, supra*, 460 F.2d at 563-65.

(footnote continued from preceding page)

depend upon "the necessities of the particular circumstances." 390 U.S. at 781. Thus, even where the rates of a regulated company are unquestionably agency-made, it does not follow that the company loses its right to initiate rate changes when economic conditions change.

¹¹ Throughout their brief, respondents interject cases in which the agency had explicitly prescribed *rates* under the applicable regulatory statute. In view of the Commission's express disclaimer that it had previously prescribed AT&T's rates, such cases as *United States v. Corrick*, 298 U.S. 435 (1936), cited at Resp. Br. 20, are clearly inapposite. Similarly misplaced is respondents' reliance on cases such as *Wisconsin v. FPC*, 373 U.S. 294, 309 (1963), which hold only that the agency may choose the procedural method by which it prescribes specific rates.

The question before the Court in *Natural Gas Pipeline* was not, as respondents and AIA contend, whether the FPC could prescribe a rate of return to be thereafter observed. The Court held only that an administrative agency could properly divide a regulatory proceeding into phases and, after full hearing on the rate of return phase, enter an interim order achieving a general revenue change. (315 U.S. at 583-84).¹²

In *FPC v. Tennessee Gas Transmission Co.*, the regulated company had filed with the FPC rate increases which were suspended for the maximum statutory period and then became effective, subject to refund, pending investigation (371 U.S. at 147-48). After completing hearings on the rate of return issue, the FPC entered an interim order pursuant to 15 U.S.C. §717d(a) ordering the company to make refunds (*id.* at 149, 151). In reviewing that refund order in *Tennessee Gas*, the Supreme Court upheld the FPC's authority to issue an interim order implementing its rate of return determination before resolving questions of cost allocation and rate structure in subsequent hearings.

Natural Gas Pipeline and *Tennessee Gas* only support the action of the FCC in treating rate of return as a separate phase in Docket 19129—a procedure which no one attacks in this Court (and which the Commission and AT&T support in the D.C. Circuit). But these decisions do not

¹² Later cases make clear that rates filed to implement general revenue orders are carrier-made rates. See, e.g., *ICC v. Inland Waterways Corp.*, 319 U.S. 671, 685-87 (1943), and other cases cited in AT&T's Brief at 35-36.

Moreover, unlike Section 205 of the Communications Act, the section of the Natural Gas Act at issue in *Natural Gas Pipeline* provided that the FPC after a hearing "may order a decrease where existing rates are unjust . . . or are not the lowest reasonable rates." 15 U.S.C. § 717d(a). The Supreme Court noted that the FPC's order therein was pursuant to that statutory proviso and not the provision which gives it the power to "determine the just and reasonable rate . . . to be thereafter observed . . ." (See 315 U.S. at 583, 585.)

even discuss, much less decide, the sole question before this Court—the power of an agency to reject carrier-initiated rate increases at some date following a rate of return determination.

Actually, as we showed in our opening brief (pp. 39-40, n. 55), the FPC decisions which are in point in the present case are directly contrary to the FCC's action here. Although the FPC has made many rate of return determinations, the FPC does not reject changes in carrier-initiated rates designed to increase the rate of return. Instead, in such cases the FPC properly follows the statutory plan: it permits the rates to be filed; decides whether to suspend them for the statutory suspension period; orders an investigation of the rate changes; and makes them subject to possible refund in the event that, after hearing, the rate increases are found to exceed the rate of return required under current conditions.

Thus respondents, on the one hand, rely upon decisions under the Natural Gas Act which do not deal with rejection of carrier rate filings and, on the other hand, disregard the FPC's administration of the Natural Gas Act which is directly contrary to the unprecedented action of the FCC here.¹³

C. The Commission's Notions of Administrative Convenience Do Not Justify Circumvention of the Precise Regulatory Scheme Set Forth in the Communications Act.

Commission counsel have gone to great lengths to assert the reasonableness and practical nature of the Commission's action summarily rejecting the full amount of AT&T's filed rate increases, allowing a partial increase, and ordering an "expedited" hearing on the rate of return

¹³ See also, *Willmut Gas & Oil Co. v. FPC*, *supra*, 294 F.2d at 250; *Mississippi River Fuel Corp. v. FPC*, 202 F.2d 899, 901-03 (3d Cir. 1953), where the courts expressly held that the FPC was not empowered to reject carrier-initiated rate changes without a hearing.

required under current conditions (*e.g.*, Resp. Br. 8). They contend that rejection of AT&T's rate increases should be upheld because the Commission attempted to deal with the ratemaking problem in "a practical manner" (Resp. Br. 25).¹⁴

However, the Commission's notion of some practical method of rate regulation cannot justify its departure from the explicit statutory scheme that Congress has established as a "careful balance" of the various interests involved. *AT&T Special Permission Case*, 487 F.2d at 872, citing *United States v. SCRAP*, 412 U.S. at 697. As this Court has held, "Congress . . . intended that specific statutory authority, rather than general inherent equity power, should provide the agency with its governing standards." 487 F.2d at 872. The Commission cannot "rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation." *Id.* at 880.

In any event, respondents are simply wrong in suggesting that adherence to the statutory scheme somehow results in a method of regulating AT&T's earnings that is not practical or equitable. It is demonstrably in the interest of customers and carriers alike for the earnings level of a regulated company to respond as rapidly as feasible to changes in its cost of capital. The Supreme Court has stressed the importance of a statutory plan under which regulated com-

¹⁴ Respondents erroneously contend that regulation of AT&T's overall earnings level is so "overwhelming" (Resp. Br. 25) that it cannot be accomplished within the framework of the statute. Such regulation requires the Commission to determine a single percentage figure that represents AT&T's current cost of capital. The Commission last made such a finding in 1972 and admits that its task is to measure the extent to which relevant economic conditions have now changed (A. 9-12.) The Commission must thus measure changes since 1972 in order to determine AT&T's appropriate rate of return in 1975, but that is not an "overwhelming rate-making problem".

panies are not "precluded by law from increasing the prices of their product whenever that is the economically necessary means" of meeting higher costs of capital; "otherwise procurement of the vast sums necessary for the maintenance and expansion of their systems through equity and debt financing would become difficult, if not impossible." *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103, 113 (1958); see AT&T Br. 24-25. Carrier-initiated rate increases are clearly a practical way to ensure such responsiveness when changing economic conditions drive up a company's cost of capital. While the rate increases are being investigated, consumers are protected by the Commission's authority to order accounting and refunds of the increased revenues (47 U.S.C. § 204) or by the right to recover reparations (47 U.S.C. §§ 206-09).

Under the Commission's *ad hoc* "practical" solution, the carrier is left with no protection at all under the Act. By respondents' theory, the Commission has only to make one so-called "prescription" of the carrier's rate of return and thereafter the carrier must wait to make rate increases until the Commission, under no time limit, has decided whether to modify its previous rate of return finding. In the meantime, the carrier could lose irretrievably the revenues necessary to cover its current cost of capital and may thus "suffer irreparable loss which in turn may impede the provision of adequate service during a period of rising costs." *AT&T Special Permission Case*, 487 F.2d at 873-74. See also, *United States v. SCRAP*, 412 U.S. at 697. Such a procedure renders meaningless the Act's express limitations on how long the Commission may delay the effectiveness of proposed rate increases.

Respondents resort to an extreme example having no bearing on the facts here: They contend that the Phase I rate of return proceeding would be rendered a "nullity" and "reduced to a meaningless exercise" if the result could

be "set aside the next day" by AT&T's filing carrier-initiated rate changes (Resp. Br. 31).¹⁵ If AT&T were to file new rate increases on the very "next day" following a Commission rate of return decision, the Commission would have 60 days within which to invoke the statutory plan and thereby suspend the rate increases for the three month statutory period and order an investigation. At such a hearing AT&T would have the burden of proving that changed circumstances warranted the increased earnings level. 47 U.S.C. § 204. With only one day intervening between the prior rate of return decision and the new rate filing, the Commission could surely make findings as to the existence of changed conditions before the five months elapsed; if sufficient changes could not be shown, the rates would be held unlawful without ever having taken effect. In these circumstances, the previous rate of return decision would serve as a benchmark from which to measure changes in conditions, and thus, the proceedings that led to that decision plainly would not have been "reduced to a meaningless exercise."¹⁶

¹⁵ AT&T did not, of course, file rate increases one day after the Commission's Phase I Decision, but more than two years later, after major changes in financial and economic conditions had dramatically increased the costs of capital. The Commission itself recognized "the fact that economic conditions had changed significantly since 1972" (A. 474) and stated that it is "cognizant of the general changes and trends in the national economy" (Order, para. 19 (A. 10)).

¹⁶ The Federal Power Commission made such use of a prior rate of return finding for Panhandle Eastern Pipe Line when that company filed rate increases for a higher rate of return just 75 days after the FPC's earlier rate of return decision. See *Panhandle Eastern Pipe Line Co. v. FPC*, 236 F.2d 606, 612 (3d Cir. 1956). The FPC did not summarily reject those increases but suspended the new rates and ordered an investigation. At the hearing the company presented evidence as to changes in conditions since the prior rate of return finding, but before the rates could

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The Communications Act thus provides the procedures by which the Commission can safeguard against its prior rate of return findings being rendered meaningless.¹⁷ But the Act also requires that in the exercise of its investigative powers, the Commission must make its findings on a current evidentiary record after opportunity for hearing and cannot summarily reject changes in carrier-made rates.¹⁸ "Whether the AT&T rates . . . are too high is a matter for the Commission to decide *after* investigation and hearing. The Commission has no authority to reject rates summarily on the ground that they are unlawfully high." *Associated Press v. FCC*, 448 F.2d 1095, 1104 (D.C. Cir. 1971) (emphasis supplied).

(footnote continued from preceding page)

take effect, the FPC held that the company had failed to justify the increases. The Court of Appeals affirmed, holding that the FPC had properly relied upon its prior rate of determination as a guide to holding unjustified the company's claim for a higher rate of return where, "after hearing and considering all evidence", the FPC found "that no significant intervening change had occurred." 236 F.2d at 609-10, 612.

¹⁷ This Court recognized in the *AT&T Special Permission Case* that "[s]ignificant questions of law and policy resolved [by the Commission] in its adjudication of the old rates can be applied to its evaluation of the new ones." 487 F.2d at 880. Thus, prior proceedings are not rendered "meaningless" or a "nullity" by carriers' subsequent rate filings. Indeed, the Commission itself has recognized that its prior rate of return findings can be used as a benchmark in determining changes in financial conditions in a new evidentiary hearing on rate of return. See, e.g., 38 F.C.C.2d at 226-27.

¹⁸ Respondents therefore fail in their attempt to distinguish this case from the *AT&T Special Permission Case*. (Resp. Br. 22, n.1.) In neither case did the Commission hold hearings and make the requisite findings with respect to the AT&T tariffs that it refused to accept for filing.

II. THE COMMISSION'S RATE OF RETURN FINDING IN DOCKET 19129 WAS NOT A PRESCRIPTION ORDER UNDER SECTION 205 OF THE COMMUNICATIONS ACT.

Respondents further contend that the "Commission's Phase I Order [in Docket 19129] was a lawful and proper exercise of its authority under Section 205" (Resp. Br. 28-32). That respondents' contentions in this regard are untenable is evident from the terms of the Commission's Docket 19129 Decision itself. This presents a matter of law, and there is no occasion for this Court to inquire into the record underlying the 1972 decision or to look beyond the face of the Commission's opinion.¹⁹

¹⁹ While making the contention that the Phase I Decision was a valid prescription order, respondents argue that petitioner AT&T is precluded from answering the point since AT&T has "waived any right" to argue on the merits because of its opposition to the Commission's motion to transfer (Resp. Br. 28). The doctrine of "waiver" is not even remotely applicable to the instant situation. AT&T's position continues to be that it is the Commission's rejection Order of March 4, 1975—and no other order—that unlawfully prevented AT&T from initiating changes in carrier-made rates. AT&T has not previously adopted inconsistent or contradictory positions. As stated in our opposition to the FCC's transfer motion, "AT&T is not . . . asking this Court to decide whether the Commission properly arrived at 8.5 percent as a fair rate of return in 1972 and whether that finding is supported by the facts of record in Docket 19129" (pp. 8-9). That issue is before the D.C. Circuit and not before this Court.

Thus, the necessary operative facts to decide whether the Commission could lawfully reject AT&T's January 1975 filing are to be found in the Commission's rejection Order here under review. It was the rejection Order that (1) held the Commission's 1972 rate of return finding to be a "prescription" that barred subsequent changes in carrier-made rates, (2) expressly disclaimed that the Commission had previously prescribed rates for AT&T, and (3) acknowledged that AT&T's rates were carrier-made.

Respondents also speculate as to the reasons this Court denied the Commission's motion to transfer (Br. 15). Yet

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Nowhere in its Docket 19129 Decision did the Commission even mention that it was prescribing charges under the terms of Section 205 of the Act. See 38 F.C.C.2d 213-251 (1972).²⁰ The order then issued by the Commission bore no resemblance to the language of a Section 205 prescription.²¹ Moreover, the Commission made AT&T's subsequently-filed interim rate changes subject to accounting and possible refund (38 F.C.C.2d at 251)—an action which in itself contradicts a Section 205 prescription under the *Arizona Grocery* doctrine (see p. 5, *supra*).

It was not until its decision denying various petitions for reconsideration of the Docket 19129 Decision, issued over eight months later, that the Commission used the word "prescrib" in one sentence and "prescription" in another sentence. 42 F.C.C.2d 293, 299-300 (1973); see AT&T Br. 7, n. 9. But a belated and loose use of those terms does not convert the Commission's action into a

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respondents fail to acknowledge that 28 U.S.C. § 2112(a) requires transfer only when the "same order" is under review in another court of appeals. Further, even when agency orders under review in two different courts of appeals are closely related and are based on the same evidentiary record, this Court has declined to transfer. *Pan American World Airways, Inc. v. CAB*, 380 F.2d 770, 774-75 (2d Cir. 1967), aff'd, 391 U.S. 461 (1968).

²⁰ Respondents refer to the Commission's procedural order at the outset of Docket 19129, and note that one of the many issues it might later decide is whether "'the Commission should prescribe just and reasonable charges . . .'" (Resp. Br. 28). But the fact that the Commission lists many issues in its procedural order does not suggest that its Phase I Decision determined all such issues. Indeed, Commission counsel have acknowledged that its Phase I Decision did not constitute a "prescription of specific rates" (Resp. Br. 19).

²¹ In contrast, when the Commission does make a Section 205 prescription, it has done so in explicit language. See, e.g., order in *Western Union Telegraph Co.*, 27 F.C.C.2d 515, 549 (1971), quoted at AT&T Br. 29, n. 39.

Section 205 prescription. Simply characterizing an action as a "prescription" does not make it a valid exercise of the Commission's Section 205 authority. *AT&T v. FCC*, *supra*, 449 F.2d at 450. The validity of a Commission action does not depend "upon the label affixed to its action by the administrative agency." *Isbrandsten Co. v. United States*, 211 F.2d 51, 55 (D.C. Cir.), cert. denied, 347 U.S. 990 (1954).²²

Respondents assert that the Commission in its Docket 19129 Decision in 1972 had found after hearing that the 8.5 to 9.0 percent return level was "fair and reasonable" (Br. 29-31). They contend this satisfies the only "essential elements" of a statutory prescription (Br. 29). But an agency finding that an increase in a carrier's general rate level is "just and reasonable" and not "otherwise unlawful" is not sufficient to constitute an agency-made prescription. *ICC v. Inland Waterways Corp.*, 319 U.S. 671, 685-87 (1943). See also *Atlantic City Electric Co. v. United States*, 306 F. Supp. 338, 341 (S.D.N.Y. 1969), *aff'd*, 400 U.S. 73 (1970); *Public Utilities Commission v. United States and FCC*, 356 F.2d 236, 239-40 (9th Cir.), cert. denied, 385 U.S. 816 (1966); and other cases at AT&T Br. 35-36.

The Commission failed to make the explicit findings and orders required by Section 205. There was no finding of the unlawfulness of the carrier's existing "charges"; there

²² In the very paragraph in the Commission's decision on reconsideration that respondents quote at length in their brief (p. 13), the prescription terminology is inconsistent with respondents' assertion that 8.5 percent was the prescribed ceiling on AT&T's earnings. The Commission at the one place referred to the "8.5-9.0% range of reasonableness prescribed by that [Docket 19129] Decision" and at the other to the "prescription of 8.5-9.0% as the range of reasonableness" (42 F.C.C.2d at 300). The Commission went on to state that "our Decision does not prohibit earnings up to 9.0%" (*id.*). Thus, even when the term "prescription" was used, it had reference to a range up to 9 percent under then current economic conditions—and not a precise "charge to be thereafter observed" as required by the terms of Section 205.

was no finding that the charges filed by AT&T were "just and reasonable"; there was no order that the charges were "to be thereafter observed"; and there was no order that the carrier "not thereafter publish, demand, or collect" any charges other than those allegedly prescribed (47 U.S.C. § 205). See *AT&T v. FCC, supra*, 449 F.2d at 450-51. Indeed, the Commission expressly stated that "we did not find as a matter of law that [AT&T's] new rates were just, reasonable, and free of undue discrimination" (42 F.C.C.2d at 301; see also 38 F.C.C.2d at 247). There is, in short, no basis for Commission counsel now to contend that the Commission's 1972 decision constituted a valid prescription order under Section 205 of the Act.²³

III. OTHER CONTENTIONS ADVANCED BY INTERVENORS SUPPORTING THE COMMISSION PROVIDE NO SOUND BASIS FOR THIS COURT TO UPHOLD THE COMMISSION'S REJECTION ORDER.

Intervenors who have filed briefs in support of the Commission advance miscellaneous grounds for upholding the rejection Order that do not appear in respondents' brief. In most instances the alleged grounds were not relied upon by the Commission when it issued its rejection Order. Indeed, the Commission flatly repudiated one of the principal reasons advanced by intervenors. Thus, AIA and MCI contend that in its Docket 19129 Decision the Commission

²³ *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970), provides no support for respondents' position (Resp. Br. 30, n. 1). While respondents observe that "a prescription had occurred" in *Moss*, they neglect to point out that such a prescription was held to be invalid because the agency failed to adhere to the explicit statutory requirements. The court held that the agency's "action must always comply with the procedural requirements of the statute" and that it must give "due consideration . . . to all the factors enumerated in the statute" (430 F.2d at 902). *Moss* illustrates once more that an agency act of prescription is governed by the precise language of the statute and that there is no inherent prescriptive authority that transcends the express statutory language.

had prescribed charges within the meaning of Section 205 of the Act and that AT&T has thereafter been charging "Commission-made" rates (AIA Br. 15-16; MCI Br. 18, 24).²⁴ But the Commission itself conceded in its rejection Order that it had made no such prescription of AT&T's rates in Docket 19129 and that AT&T's rates remained carrier-made after that decision. Order, para. 17 and n.14 (A. 10). Under the well-established rule of *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), an agency's action can be sustained only upon the grounds on which the agency chose to rest it, and since the Commission has disavowed any prescription of AT&T's rates under Section 205, that ground cannot support the Commission's Order.

Although the Communications Act nowhere authorizes the Commission to prescribe "rate of return", AIA and MCI both argue that a rate of return finding is the equivalent of a prescription of "charges" within the meaning of Section 205. (AIA Br. 15-16; MCI Br. 18, 25.) However, as we showed in our opening brief (pp. 31-34)—and as Commission counsel do not dispute—the term "charges" is quite distinct from "rate of return". Under the parallel provisions of the Communications Act, the court decisions, and the Commission's rules and practice, the term charges is synonymous with specific rates—the fixed amount "in dollars and cents . . . per chargeable unit of service," which

²⁴ Moreover, MCI contends that the Commission's alleged prescription in its Docket 19129 Decision was unlawful (MCI Br. 13). Assuming with MCI that the Commission had actually made some sort of invalid prescription, the effect of overturning that attempted prescription would be to leave AT&T's rates as carrier-made. *Atchison, Topeka & Santa Fe Ry. v. Wichita Board of Trade*, 412 U.S. 800, 817-26 (1973). MCI is thus contending inconsistently that, on the one hand, the Commission has unlawfully prescribed AT&T's rates and that, on the other hand, such an invalid prescription is grounds for barring subsequent carrier-initiated rate changes under the Act.

the Act requires the carrier to publish in schedules and file with the Commission and which the carrier must adhere to when furnishing service to the public. 47 U.S.C. § 203; 47 C.F.R. § 61.55. Rate of return, on the other hand, is subject to constant change, depending on a carrier's level of revenues, investment, and operating expenses.²⁵

Under the novel theory advanced by AIA and MCI, if rate of return were the statutory equivalent of "charges," the carrier would have to file and publish schedules showing its rate of return, in accordance with Section 203(a) of the Act (which requires filing of schedules showing "all charges"). The carrier would be forced to change its rates on a virtually continuous basis in order to adhere to the "prescribed" rate of return. 47 U.S.C. § 203(c). With 8.5 percent "prescribed" as the minimum rate of return, AT&T would be subject to criminal penalties whenever its rate of return fell below this amount. 47 U.S.C. § 501. Indeed, under this theory, AT&T would have been subject to criminal sanctions at the time of its January 1975 tariff filing because its rate of return had fallen to 7.89 percent (see Order, para. 19; A. 10). Surely, Congress did not contemplate this result, and it cannot be seriously suggested

²⁵ Respondents suggest that operating expenses are distinct from rate of return, and they contend that if AT&T's filed rate changes had been based on increased operating expenses, "the Commission would have been unable to reject" the January 3, 1975 rate filing (Br. 5, n.1). This theory results in the anomaly that a carrier may reflect some costs—such as labor—in tariff revisions, but other costs—such as cost of capital—can be prescribed so as to preclude rate changes. But no such cost is susceptible to a prescription for the future. Respondents' notion is contradicted by the Commission's own position that "rate of return . . . is a percentage expression of the *cost of capital* [and] is just as real a *cost* as that paid for labor, material, and supplies, or any other item necessary for the conduct of business" (emphasis supplied; 9 F.C.C.2d at 51). See also 38 F.C.C.2d at 226. Respondents' attempt here to ignore that definition and create distinctions among a carrier's costs is at best spurious.

that "rate of return" is synonymous with "charges" as that term is used in Sections 203-205 of the Act.²⁶

Indeed, immediately prior to the enactment of the Communications Act of 1934, Congress recognized that it was unworkable for a regulatory agency to prescribe a carrier's rate of return. Thus, in 1933 Congress repealed a provision of the Interstate Commerce Act that had required the ICC to prescribe binding prospective rates of return for the railroads.²⁷ In 1920 Congress had authorized the ICC to fix the rates of return for railroads to observe in the future.²⁸ Thereafter, the ICC undertook to prescribe rates of return, declaring that its "determination of what will constitute a fair return . . . is . . . a function distinct from that of initiating and adjusting rates" for specific services. *Reduced Rates*, 68 I.C.C. 676, 680 (1922). But after attempting to administer this provision, it became apparent to the ICC that prescribing a maximum rate of return prospectively was an unsound method of regula-

²⁶ MCI also argues that a rate of return finding constitutes a "practice" which the Commission may prescribe pursuant to Section 205 (Br. 15). This interpretation of "practice" conflicts with the plain language of the statute and the Commission's rules and regulations. See 47 U.S.C. 203(a). The Commission's Rules, pertaining to the composition of tariffs, require a "clear and definite statement" of the carrier's "practices and classifications". 47 C.F.R. §§ 61.55(g) and 61.18. Despite the requirement that all "practices" be filed and published, the Commission has never demanded or even suggested that a carrier's filed tariffs should include a statement of the carrier's anticipated rate of return.

²⁷ Emergency Railroad Transportation Act of 1933, ch. 91, Title II, § 205, 48 Stat. 220.

²⁸ Transportation Act of 1920, ch. 9 § 422, 41 Stat. 488; see S. Rep. No. 304, 66th Cong., 1st Sess. 15-19 (1919); H. Rep. No. 456, 66th Cong., 1st Sess. 8-10 (1919); H. Rep. No. 650, 66th Cong., 2d Sess. 67-68 (1920).

tion.²⁹ Accordingly, in 1933 Congress repealed the ICC's authority to prescribe rates of return, with the Senate Commerce Committee declaring that "the whole principle underlying [such regulation] is wrong."³⁰

The very next year, Congress passed the Communications Act of 1934, which was patterned on the Interstate Commerce Act. See AT&T Br. 19, n. 26. Over the succeeding 41 years the FCC never claimed authority to prescribe a prospective rate of return until, in its instant rejection Order, the Commission announced that its prior rate of return finding had been a "prescription" of AT&T's rate of return that made future carrier-initiated rate changes subject to rejection. This Order thus attempts to revive a scheme of regulation that Congress had discarded in 1933 as unsound in theory and unworkable in practice.

Finally, Pennsylvania argues that the doctrine of "equitable estoppel" bars AT&T from contesting the Commission's rejection Order because AT&T subsequently filed rate increases for the lesser amount the Commission indicated it would permit. Pennsylvania's position is entirely unfounded.³¹ "An acceptance of a portion of that to which

²⁹ See Annual Report of ICC 86-90, 96 (1930); Annual Report of ICC 92-93, 108-10, 119-20, 347-67 (1931); Annual Report of ICC 16-18, 100-01 (1932).

³⁰ Emergency Railroad Transportation Act of 1933, ch. 91, Title II, § 205, 48 Stat. 220; S. Rep. No. 87, 73d Cong., 1st Sess. 3-4 (1933). See also H. Rep. No. 193, 73d Cong., 1st Sess. 27-30 (1933).

³¹ Cases such as *Admiral-Merchants Motor Freight, Inc. v. United States*, 321 F.Supp. 353 (D. Colo.), aff'd, 404 U.S. 802 (1971), cited by Pennsylvania (Br. 6), are wholly inapposite. In that case the carriers were held to be estopped from contesting an ICC refund order to which they had previously acceded, and upon which the agency had expressly conditioned its granting of the carrier's request to extend the time of a rate investigation. Similarly inapposite is *FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492 (1955) (Pa. Br. 6), where the company was estopped from attacking a merger condition which it had itself proposed, and upon which the FPC had relied in approving the merger four years previously.

a party is entitled . . . is not a bar to the subsequent assertion of a claim for the rest, especially where acceptance is accompanied by a reservation of the remaining rights, or it is manifest that the party doesn't intend to surrender them." *Bankers Trust Co. v. Pacific Employers Ins. Co.*, 282 F.2d 106, 112 (9th Cir. 1960), *cert. denied*, 368 U.S. 822 (1961).

AT&T had no choice but to file for the lesser rate increase in view of the urgent need for additional revenues. Moreover, AT&T stated in its transmittal of that filing that it reserved its right to contest the Commission's March 4, 1975 rejection Order as unlawful. See AT&T Br. 14, n. 19. As this Court noted in the *AT&T Special Permission Case*, where the Commission had accepted some revisions and unlawfully denied AT&T permission to file others: "the mere filing of [some] rates . . . does not prevent this Court from granting to AT&T the meaningful relief to which we hold it is entitled." 487 F.2d at 881, n.35.³²

³² In the "Statement of Position" filed by ARINC and ATA, these intervenors advance their opposition to other aspects of the Commission's Order. These intervenors have not filed any petition for review of the Order, and the collateral matters that they raise are beyond the scope of this review proceeding.

To the extent these intervenors seek to support the Commission's rejection Order, it is on the ground that there is an unlawful "pancaking" of rate increases for certain services of which those intervenors are large users (ARINC/ATA, pp. 3-4). However, the same argument made by the same parties was denied by the Court of Appeals in *Associated Press v. FCC*, 488 F.2d 1095, 1102, 1104-05 (D.C. Cir. 1971): "We know of no rule of law that a proposed rate increase must be rejected because the lawfulness of a prior rate increase has not been finally determined." To the same effect is *Willmut Gas & Oil Co. v. FPC*, 294 F.2d 245, 249 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 975 (1962).

CONCLUSION

For the reasons stated in this reply brief and in AT&T's opening brief, the Commission's Order rejecting AT&T's tariff revisions filed on January 3, 1975, should be set aside, and the Court should direct that the Commission accept AT&T's proposed new rates for filing and permit them to go into effect without further delay.

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May 29, 1975

CERTIFICATE OF SERVICE

I, Jules M. Perlberg, certify that I served copies of the Petitioner's Reply Brief this 29th day of May, 1975, by mail, postage prepaid, on the Federal Communications Commission, the United States of America, and each of the intervenors in No. 75-4046, as set forth in the attached list.

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